Supreme Court, U.S.
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No. 07- 07-5**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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JOAN HEFFINGTON
And on Behalf of Minor Son, G.M.
*Petitioner, Pro Se,*

v.

DISTRICT COURT OF SEDGWICK COUNTY
WICHITA, KANSAS,
NOLA FOULSTON, Sedgwick County District Attorney,
JULIA CRAFT-ROCHAT,
*Respondents.*

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**On Petition for Writ of Certiorari**
**To The United States Supreme Court**

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# PETITION FOR WRIT OF CERTIORARI

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Joan Heffington
*Petitioner, Pro Se*
And on Behalf of
Minor Son, G.M.
7145 Blueberry Lane
Derby, Kansas 67037
(316) 788-0901

April 27, 2007

## Questions Presented For Review

1. Whether petitioner and her son were deprived of liberty and property without due process of law.

2. Whether petitioner and her son should have been appointed effective assistance of counsel under the 6th Amendment.

3. Whether petitioners' due process rights were violated with regard to their right to counsel, right to be heard, equal protection rights, and right to a trial by jury were violated.

4. Whether petitioner filed within the specified time, and whether the court abused its discretion in this regard.

5. Whether the actions of the defendants, their counsel and the court is shocking to the conscience and considered "outrageous government conduct."

6. Whether this case should be decided on its merits and remanded back for trial to ensure due process of law.

7. Whether the United States legal system should take affirmative steps to effect "justice for all" by passing Amendment XXVIII to the U.S. Constitution requiring usage of the "Farr Factor" prior to filing any lawsuits/charges against a person or entity: (1) to prevent attorneys from violating the constitutional rights of citizens; (2) to ensure that attorneys abide by the same laws as citizens; (3) to protect parties in interest that are not in the courtroom; (4) to protect the overall integrity of the system of justice; and (5) to ensure that justice above money prevails in our legal system.

8. Whether the United States Supreme Court should be required by law to hear all cases alleging government fraud.

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## PETITION FOR WRIT OF CERTIORARI

Joan Heffington, petitioner *pro se*, and on behalf of minor son, G.M., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth District, entered in the above-entitled case on January 29, 2007.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit whose judgment is herein sought to be reviewed, is reported in Case No. 05-3372 on January 29, 2007, and is reprinted in Appendix A of this petition.

In response to the defendants' motion to dismiss this case filed on March 30, 2005, two separate orders were issued on the same day by two different judges. On June 17, 2005, Magistrate Judge James P. O'Hara issued an Order Setting Scheduling Conference to try and mediate this case. Approximately two hours later, U.S. District Senior Judge Sam A. Crow issued a Memorandum and Order granting the defendants'motion to dismiss. The United States District Court for the District of Kansas denied petitioners' Motion to Set Aside Memorandum and Order on Motion for Reconsideration in Case No. 05-4028-SAC on August 31, 2005. A Notice of Appeal in this case was filed by petitioner on September 26, 2005.

## JURISDICTION

Petitioner filed suit in this matter on March 4, 2005 in the District Court for the District of Kansas. Respondents filed a motion to dismiss on March 30, 2005. On June 17, 2005, Magistrate Judge James O'Hara in Topeka entered an order setting a scheduling conference to mediate this matter. Two hours later, a second order to dismiss this case was entered by U.S. District Senior Judge Sam Crow in Kansas City. Petitioner requested reconsideration, but it was denied.

Final judgment of the District Court for the District of Kansas was entered on August 31, 2005. Plaintiff filed an appeal with the United States Court of Appeals for the Tenth Circuit on September 26, 2005. On January 29, 2007, the judgment of the district court was affirmed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. @ 1257.

## RELEVANT STATUTORY PROVISIONS

U.S. Constit. Amendment V: "Nor shall any person ... be deprived of life, liberty, or property without due process of law."

U.S. Constit. Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the assistance of counsel for his defence."

U.S. Constit. Amendment VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

U.S. Constit. Amendment XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Denial of Rights Under Color of Law, including:

18 USC@242: "...whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any person in any State... to the deprivation of any rights ... secured or protected by the Constitution or laws of the United States...shall be fined under this title or imprisoned, not more than one year, or both."

18 USC@245: "...whoever, whether or not acting under color of law, intimidates or interferes with any person from participating in ...(or)applying for or enjoying employment, or any prerequisite thereof, by any agency of the United States; shall be fined under this title, or imprisoned not more than one year, or both."

42 USC @1983: "...every person who, under color of any statute, ordinance, regulation, ....of any State,...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Supreme Court Rule 10(a) & (c) provides in relevant part: (a) "a United States court of appeals...has so far departed from the accepted and usual course of proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," and (c) "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court..."

Fed. R. Civ. P. 6(a) & (e) provides in relevant part: (a) When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays [Independence Day] shall be excluded in the computation," and (e): "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B),(C), or (D), 3 days shall be added to the prescribed period."

Fed. R. Civ. P. 60(b)(1)& (6) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party... from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or

excusable neglect: and/or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time..."
*in terrorem populi*: "to the terror of the people."
*res ipsa loquitor*: "the matter speaks for itself."
Pledge of Allegiance: "...with liberty and justice for all."

## STATEMENT OF THE CASE

This case is an extension of the same and/or similar claims alleged in a Petition for Writ of Certiorari in Case No. 01C0771 (Federal Case No. 02-88617-A) filed by Mark and Joan Heffington on December 19, 2003. This matter is continuous ongoing retaliation for the claims alleged in Mrs. Heffington's prior suit. In this case, her 14-year old son, G.M., was persecuted for false and frivolous charges by the defendants, just because she appealed Case No. 01 C 0771, because she wrote a book called *TEN SECRETS You Must Know Before Hiring a Lawyer*, and because she formed an organization called the Association for Honest Attorneys (A.H.A!). Petitioner has been continually denied the right to effective assistance of counsel since 2000, and now her minor child has been denied as well.

The defendants continued to drag G.M.'s legal matters out for several years to cause him and his mother severe emotional distress and mental anguish, to the point that G.M. considered suicide. Such outrageous government conduct is utterly intolerable in a civilized society. Cases like this show that our government is failing because judges will not follow our own laws, or God's (see II Chronicles, Ch. 19). The claims in this matter are clearly criminal, violating the petitioners' right to due process under the Fifth Amendment and their Sixth Amendment right to counsel and a trial by jury. But petitioner Mrs. Heffington has seen where the

legal system picks and chooses which laws it will follow, refusing to follow its own. Although there were over 500 pieces of evidence and over 150 laws broken in Case No. 01C0771 (Appeal No. 02-88617-A), all of this was ignored by the lower court. What has happened to America? Even the highest court in the land would not hear Mrs. Heffington's prior case which was of significant public importance. It is apparent that innocent people everywhere are allowed to continually suffer needless emotional and physical distress at the hands of our corrupt and unjust court system.

This matter is *res ipsa loquitor* – "it speaks for itself." The respondents have not come forth with anything to prove that the petitioner's claims are untrue. The lower courts make a mockery of justice by refusing to mediate, failing to ask for any discovery, and dismissing such important cases on technicalities without even considering the merits. Clearly, the voices of women and children are not heard in America, and this case is "*in terrorem populi.*"

Therefore, petitioner requests that this court adopt and incorporate her arguments, cases and laws stated in Case No. 01C0771 (Appeal No. 02-88617A) Writ of Certiorari which apply to the questions presented in this case, since many of them apply to this matter as well.

## REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10 (a) & (c), the judgment of the Kansas Court of Appeals should be reviewed by this Court for two compelling reasons: (1) the lower court has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power; and (2) they have decided important questions of federal law that conflict with relevant decisions by this Court and that have not been, but should be, settled by this Court.

## 1. PETITIONERS DEPRIVED OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW

G.M. had never been in trouble prior to the first set of false charges brought against him in July, 2002. Even though he was actually a hero for saving the school from being shot up, he was continually watched, as if he were a criminal (ROA, Doc. 8). He became depressed, suffered low self-esteem and his grades plummeted. When the defendants intentionally dragged out his charges over several years, he was so distraught that he became defiant, started drinking and was occasionally suicidal. The defendants cared nothing about G.M. or the facts in this case, acting only to persecute an innocent child as retribution toward his mother (see Heffington v. Bob Cook Homes, LLC Writ of Certiorari filed December 19, 2003 for arguments pertaining to Mrs. Heffington.) Private parties may be found to have engaged in "governmental action" sufficient to subject their activities to this amendment (Amendment V). *Local 1498, Am. Federation of Government Emp. V. American Federation of Government Emp., AFL/CIO, C.A. Pa. 1975, 522 F.2d 486.* G.M. was treated like an outcast at school. One's reputation or good name is an element of liberty protected by this amendment. *Casey v. Roudebush, D.C. Md., 1975, 395 F.Supp.60.* Requirements of the due process clause under Amendment V apply only to denial of property or liberty rights protected by the Constitution. *National Ass'n for Advancement of Colored People (Atlanta Local) v. U.S. Postal Service, D.C.Ga.1975, 398 F.Supp.562.*

The petitioners' right to due process was violated when the defendants and their counsel acted to deny petitioners' representation by influencing attorneys, the news media and local, state and national agencies not to represent them or act on their behalf in any capacity. Mrs. Heffington also continued to suffer defamation and public hatred from her loss of liberty. Her evidence in Case No. 01C0771 was so

]strong that any reasonable person would agree that government officials and agencies had engaged in the conspiracy to deprive her of her liberty in this matter. In regard to the Fourteenth Amendment, private individuals may be found guilty as principals if they aid and abet state officers in such violations. *U.S. v. Lynch*, N.D.Ga.1950, 94 F.Supp. 1011, affirmed 189 F.2d 476, certiorari denied 72 S.Ct. 50, 342 U.S. 831, 96 L.Ed. 629. Also, where the government injures a person's reputation and in so doing effects a removal, extinguishment, or significant alteration of an interest recognized and protected by law, it must give the person his procedural due. *Bartel v. F.A.A., 1984, 725 F.2d 1403, 233 U.S.App.D.C. 297.*

## II. PETITIONER AND HER SON SHOULD HAVE BEEN APPOINTED (EFFECTIVE) ASSISTANCE OF COUNSEL UNDER THE 6TH AMENDMENT.

The defendants in this matter intentionally tried to mislead petitioner and her son into believing that G.M.was guilty of false and frivolous charges. In addition to Amendments V (& XIV), there were violations by the defendants of 18 U.S.C.@ 242 & 245 and 42 USC@ 1983. Petitioner did not fail to assert any violation of her own legal rights and interests, as these are clearly stated in the alleged facts and can also be inferred by any reasonable person. This case also raises the question (also raised but ignored in Mrs. Heffington's previous writ):

> "If an individual has a constitutional right to have an attorney appointed to represent him in criminal matters if he can't afford one, shouldn't an individual have the right to an appointed attorney in civil matters if he can't afford one?"

This is especially true if the lack of representation in a civil matter leads to lack of effective representation in the

criminal case. The same would hold true of civil matters that are quasi-criminal, such as this one. In regard to 18 U.S.C. @242. this statute makes it criminal to act willfully and under color of state law to deprive a person of rights protected by the Constitution or laws of the United States which encompasses rights protected by the due process clause of the Fourteenth Amendment. *U.S. v. Lanier*, U.S. Tenn.1997, 117 S.Ct. 1219, 520 U.S. 259, 137 L.Ed.2d 432, on remand 114 F.3d 84, on remand 123 F.3d 945.

## III. PETITIONERS HAD CONSTITUTIONAL RIGHT TO COUNSEL, RIGHT TO BE HEARD AND RIGHT TO A TRIAL BY JURY

### A. Right to Due Process Violated When Defendants and Their Counsel Acted to Deny Petitioners Legal Representation

In Mrs. Heffington's previous litigation, there was clear and convincing evidence to show that the defendants and their counsel influenced other attorneys, numerous local, state and national agencies, and even the news media so that she and her husband would not be able to acquire legal representation in their matter. In cases such as this, where even the criminal intent of fraud was clear and convincing, the court should have inquired as to whether petitioners needed counsel and provided it to them. Instead, they outrightly denied them counsel after it was requested, even though the circumstances in both cases were extraordinary. The court quotes *Meeker v. Kercher*, in which "(A) minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney." Mrs. Heffington contends that extraordinary circumstances apply – who would represent her son in this case if not herself? Besides, Judge O'Hara issued a scheduling order to mediate – isn't this an obvious indication by the court that they

expected Mrs. Heffington to mediate on behalf of G.M.? The court also quotes *Warth v. Seldin*, in which "[T]he plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." It is obvious to any reasonable person that Mrs. Heffington brings this suit for herself as well as her minor son, G.M., and she erred by not adding the word "and" in the caption of her case (Joan Heffington, And On Behalf of Her Minor Son, G.M.). A litigant and her minor child who are forced to proceed *pro se* should not be held to the same standards as that of an attorney. They were clearly denied due process when their entire case was dismissed on technicalities due to a lack of legal expertise.

Thus, the decision of the lower court to hold petitioners to the same legal standards as defendants in this matter was unconstitutional. In addition, petitioner was also denied oral arguments in this matter by the Tenth Circuit Court of Appeals. The right of a litigant to be heard is one of the fundamental rights of due process of law. *Council of Federated Organizations v. Mize*, C.A.Miss. 1964, 339 F.2d 898. See also *Ricker v. U.S.*, D.C.Me. 1976, 417 F.Supp. 133, supplemented 434 F Supp. 1251.

B. Petitioners Denied Equal Protection

Petitioners were denied equal protection because they were not treated fairly by the court. Mrs. Heffington is not and has never been an attorney but should be allowed to represent her son under such extraordinary circumstances. If she can't find an attorney and is not allowed to represent her son, then G.M.'s constitutional right to due process and equal protection under the 5th and 14th Amendments to the U.S. Constitution are violated. In fact, the argument can be made that *pro se* litigants are discriminated against because they lack the legal expertise to properly present their claims to the court.

Defense counsel and the court took advantage of

petitioners' errors at every opportunity in an effort to dismiss their claims. Courts should not deny cases with substantial merit, but the court system is so backed up with cases to resolve due to a lack of manpower, they look at any reason to exclude a case for consideration of appeal. This is especially true of *pro se* litigants who don't know the ins and outs of appeal procedure. The due process clause under Amendment V encompasses equal protection principles. *Mathews v. de Castro*, Ill.1976, 97 S.Ct. 431,429 U.S. 181,50 L.Ed.2d 389.

C. Right to Trial By Jury Denied Petitioners Under Amendment VII

Not only was petitioner not given the right to be heard in this case, but the right to a trial by jury was also denied. Protection of individuals against arbitrary government action is the great purpose of the due process clause under Amendment XIV. *Wilwording v. Swenson,* C.A.Mo.1974, 502 F.2d 844, certiorari denied 95 S.Ct.835, 420 U.S.912, 42 L.ed.2d 843, on remand 405 F.Supp. 447.

The dismissal of all claims in this case contravenes the petitioners' right to due process of law under Amendment V and XIV of the U.S. Constitution. The Heffingtons had the constitutional right to be represented by counsel in this matter, and were deprived of this by defendants and their counsel. A civil litigant has a constitutional right deriving from due process to retain hired counsel in a civil case. *Gray v. New England Tel. and Tel. Co., C.A.1 (N.H.) 1986, 792 F.2d 251.* Furthermore, the guarantee of the right to counsel under Amendment VI is within the intendment of the due process clause. *Smith v. U.S.*, D.C.N.J.1966, 250 F.Supp. 803, appeal dismissed 377 F.2d 739. Consequently, the court's dismissal of this case without any discovery denies the petitioners' right to be heard, equal protection rights and right to a trial by jury.

Finally, due process is violated whenever the

performance of counsel, whether retained or appointed, is so deficient as to render the proceedings fundamentally unfair. *U.S. v. Alvarez*, C.A.Ga.1978, 580 F.2d 1251. In this case, the proceedings can't be anything but fundamentally unfair, since petitioners were denied the right to counsel altogether.

## IV. PETITIONER DID NOT FILE OUT OF TIME/ COURT ABUSED ITS DISCRETION

The merits in this case were ignored, and petitioners' claims dismissed due to technicalities in preparing their paperwork and/or abuse of discretion. In all fairness, petitioners ask for special consideration of any errors they may have made in preparing this writ of certiorari as *pro se* litigants. Fair play is the essence of due process. *Galvan v. Press, Cal.1954,74 S.Ct. 17,348 U.S. 852,99L.Ed.671.*

Petitioner has already argued in her Motion to Set Aside Order that she did not file out of time, due to the July 4 holiday. Furthermore, she did not fail to file a timely notice of appeal, as the court contends. When two completely opposite decisions were rendered on June 17, 2005 (one order for scheduling/mediation, the other order to dismiss), Mrs. Heffington filed a Motion to Reconsider on July 5 due to the confusion caused by the court. She then waited for a response and the court affirmed its motion to dismiss on August 4, 2005. She then filed a motion to set aside this order on August 12, 2005, which was denied on August 31, 2005. Therefore, Mrs. Heffington was well within the 30-day time limit for filing a notice of appeal when she did so on September 26, 2005.

The district court does not address the merits in this case, choosing instead to dismiss on technicalities, and not even valid ones at that. Will this court allow such activity to continue? In Plaintiff's Motion to Set Aside Order (Fed. R. Civ. P. 60(b)(6)), Mrs. Heffington already argued a good reason to justify relief – the fact that two decisions were

rendered by two different judges on the same day, one to mediate and one to dismiss the case. Isn't this confusion enough to justify relief? Rule 60(b)(1) or (6) should have been considered by the court to allow the judgment to be set aside. This court must construe petitioner's pleadings liberally due to the fact that she has been forced to proceed *pro se*. Petitioner also asserted Fed. R. Civ. Proc. 6(a) & (e), and this is sufficient reason to grant relief under extraordinary circumstances.

Which of the lower court's orders takes precedence? The court should not have dismissed this case because the scheduling order (to mediate) was granted before the order to dismiss, and mediation would have put plaintiff on equal standing with opposing counsel. Her lack of legal expertise would not have been such an obstacle. Realistically, in every case where there is a *pro se* litigant, mediation should be given serious consideration. In any event, there are grounds to believe that the court made a mistake in its ruling. Also, how would a *pro se* litigant know that the court does not allow three days for mailing for cases filed in a specified manner? There are numerous cases where excusable neglect allowed extra time, and the court should have exercised its discretion to allow the extra time in this case. An abuse of discretion exists only when no reasonable man would take the view adopted by the trial court. *Enlow v. Sears, Roebuck & Co.*, 822 P.2d 617, 249 Kan. 732 (1991).

Since time seems to be an issue in question, why did the United States District Court for the Tenth Circuit sit on this case for sixteen months before entering a judgment? They make it appear that this case was easily decided, but took longer than a year to decide it. Then a six-page decision is rendered based on procedural technicalities. Any case decided on this basis shouldn't take this long to decide. Doesn't this point to the court taking the easy way out? They obviously don't care about the merits in this matter, or innocent children suffering needlessly at the hands of a corrupt legal system.

## V. OUTRAGEOUS GOVERNMENT CONDUCT OF DEFENDANTS, COUNSEL AND COURTS VIOLATES DUE PROCESS AND SHOCKS CONSCIENCE

The facts in this matter point to an even broader constitutional problem not yet addressed by the court: a severe lack of justice in our justice system. When cases of this magnitude are dismissed because a litigant is without counsel, it is evident to any reasonable person that we have a justice system but no justice. Thus, the guaranteed claim of "justice for all" in our Pledge of Allegiance does not exist.

In Mrs. Heffington's previous case, her former attorney even confirmed to her that there is no justice in our justice system. It is evident in this matter that the poor and struggling are oppressed by the rich and powerful in our country to a much greater degree than imagined. It has gotten to the point that justice no longer exists, but money and power now rule over what is right.

For "outrageous" government conduct to succeed, it must be shown that challenged governmental conduct violated fundamental fairness and was shocking to a universal sense of justice mandated by the due process clause. *U.S. v. Haimowitz,* C.A.Fla.1984, 725 F.2d 1561, certiorari denied 105 S. Ct. 563, 469 U.S. 1072, 83 L.Ed.2d.504. A reasonable person would only have to review the facts in this case and the following actions of the defendants, counsel and court toward petitioners to determine them shocking and/or outrageous:

Persecuting an innocent child (G.M.) with false/frivolous charges as retribution toward his mother, just because she was seeking justice in a lawsuit?

Influencing numerous attorneys not to represent a child, for the same reason?

Court-appointed attorneys telling G.M. he would be found

guilty, even though it was a false charge against him?
A judge threatening G.M. in the courtroom, when he had done no wrong?
Targeting G.M. with additional frivolous charges?
Influencing local, state and national agencies, as well as the news media, not to assist those seeking justice?
Allowing litigation to drag out needlessly to cause a child and his mother to suffer severe health problems, all the while knowing that the charges are false and/or frivolous?
Ignoring the suffering of an innocent child, knowing that G.M. was physically and emotionally distraught to the point of near suicide?

There was significant evidence in Mrs. Heffington's previous lawsuit; however, it was all ignored. In that case, the defendants and their counsel chose to hurt petitioners' family, ruin their business, run them out of money, try to fool them into believing they had no case, cause them to go through a legal matter without an attorney for over three years, and influenced court officials to engage in evidence tampering. Her case was still dismissed, and in January, 2002, Mrs. Heffington mentioned in a hearing on a Motion to Reconsider that no matter what issues grown-ups may have, "you don't hurt the children." She filed an appeal in February 2002, and any reasonable person would believe that the defendants used the legal system to bring false criminal charges against G.M. in July 2002 to cause her further distress (the school incident occurred in January, 2002). This was certainly outrageous government conduct, since G.M. tried to report an intended school shooting and was falsely arrested, the alleged shooter was arrested at school the next morning, and charges for filing a false (fire) alarm were brought against G.M. six months later!) Court-appointed attorneys insisted he would be found guilty, even though he was innocent and the charges were false and misapplied.

Mrs. Heffington's efforts to obtain dismissal through numerous government agencies proved futile. G.M. suffered extreme mental anguish as the false charge dragged on for 17 months to an unnecessary trial in which the erroneous charges were finally dismissed. He was later targeted by still more frivolous charges, as retaliation toward his mother. Such acts are shocking to anyone's conscience. Just as shocking is the ability of the court of appeals to ignore these facts and affirm the district court's decision in this matter.

This case has striking similarities to *U.S. v. Robinson* in regard to outrageous conduct of police officers. In this ruling, the words "police/police officers" are substituted with the words "lawyers/legal" as it applies to this case:

> "Factors to be considered in determining whether conduct of [lawyers] is so outrageous as to violate due process include the need for type of [legal] conduct, the impetus for the scheme, the control the government exerted over the criminal enterprise, and the impact of the [legal] activity on the commission of the crime." *U. S. v. Robinson*, C.A.6 (Ky.) 1985, 763 F.2d 778.

Intentional fraud and gross negligence can amount to criminal acts, but instead of appointing a special prosecutor or directing the state attorney general to intervene, the court did nothing. Clearly, the actions of the defendants, their counsel and the courts are a violation of petitioners' right to due process, shocking to the conscience and considered "outrageous government conduct." An independent watchdog agency is needed to rein in the illegal and unethical activities of police, courts and corrections operating within our legal system.

## VI. CASE SHOULD BE DECIDED ON ITS MERITS AND REMANDED BACK FOR TRIAL TO ENSURE DUE PROCESS

It has been shown that the petitioners were denied due process by the local, state and national governments in this matter, resulting in manifest injustice. It should be noted that Mrs. Heffington was also deprived of property by the court. U.S. Magistrate Judge K. Gary Sebelius granted her application to file this action without payment of fees on March 8, 2005; however, on October 27, 2005, U.S. District Senior Judge Sam Crow denied the same request in regard to her appeal. Mrs. Heffington was ordered to pay the $455 fee when the Tenth Circuit rendered its judgment in this case. The due process clause of Amendment XIV and Amendment V are directed at the protection of the individual, who is entitled to the immunity thereof as much against the state as against the national government. *Curry v. McCanless, Tenn.* 1939, 59 S.Ct. 900, 307 U.S. 357, 83 L.Ed.1339.

In addition to extreme losses of liberty and property, petitioner and her son continue to suffer emotionally and physically due to the lack of justice in this matter. Mrs. Heffington's health continues to deteriorate with four operations in the last six months, and G.M. struggles with binge drinking, trying to keep a job, and recently considered becoming a monk in a monastery far away. Clearly, this matter deserves to be remanded back for the right to a trial by jury under Amendment VI to ensure petitioners' right to due process of law, and not dismissed on technicalities due to their errors. Petitioner deserves the right to be heard, especially in regard to her son.

## VII. REQUEST FOR PASSAGE OF AMENDMENT XXVIII TO IMPLEMENT THE "FARR FACTOR" PRIOR TO FILING LAWSUITS/ CHARGES

The legal system and the news media have saturated our society with the idea that lawsuits, particularly frivolous ones, run rampant in this country. This is largely due to

people believing everything an attorney tells them, right or wrong, and the need for attorneys to increase their profits. One can sue for just about anything these days, and many attorneys are adept at feeding off of the emotions involved in any given situation. Frivolous lawsuits have been won while those having merit are dismissed on technicalities with no right to a jury trial, as in this case. The lack of justice is best described by Bill O'Reilly in *Who's Looking Out For You?:*

> "Our justice system is overburdened, driven by money and connections, and sometimes downright corrupt, and few in power seem to care...This is a disgraceful situation and one that should be addressed by the Supreme Court immediately." 1

When our justice system is based on money rather than justice, this has repercussions throughout society which are damaging to our nation as a whole. If left unheard by this court, it appears acceptable in our legal system for government entities and state actors to "beat up" innocent women and children and deny them their rights. Indeed, this case should be considered *in terrorem populi.*

A solution is to adopt Amendment XXVIII to the United States Constitution to allow protection of citizens rights in two ways: (1) a person would have the right to be appointed counsel in a civil matter if he cannot afford it; and (2) implementation of the Farr Factor prior to the filing of any lawsuits or charges against a person or entity would assist in ensuring "justice for all" in any legal matter. The Farr Factor is described in *TEN SECRETS You Must Know Before Hiring a Lawyer* 2 It involves computerization of all the evidence in a matter prior to filing lawsuits or bringing

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*1 See* Bill O'Reilly, *Who's Looking Out For You?* 165, Broadway Books, N.Y. (2003)

*2 See* Joan Farr, *TEN SECRETS You Must Know Before Hiring a Lawyer*, Association for Honest Attorneys, pp. 112-114 (2004).

charges against a person or entity. The program would generate a percentage of likelihood that a party would win, and this factor would immediately be revealed to the parties. This method can significantly reduce the number of lawsuits filed, help to eliminate illegal/unethical conduct by attorneys, And ensure that justice remains in our justice system. Court caseloads would be lessened giving judges more time to adequately review cases, and opinions could be rendered based on true justice rather than the amount of money an attorney is being paid. Indeed, oppression would be lessened and a great amount of stress would be lifted from the people.

In summation, Amendment XXVIII is needed: (1) to prevent attorneys from violating constitutional rights of citizens; (2) to ensure that attorneys abide by the same laws as citizens; (3) to protect parties in interest that are not in the courtroom; (4) to protect the overall integrity of the system of justice; and (5) to ensure that justice above money prevails in our legal system.

## VIII. UNITED STATES SUPREME COURT SHOULD BE REQUIRED BY LAW TO HEAR ALL CASES ALLEGING GOVERNMENT FRAUD

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only for compelling reasons." What could be more compelling than our court system persecuting innocent children with false and/or frivolous charges? The objective of the United States Supreme Court is to hear cases of significant public importance, and they should be required by law to hear any and all cases alleging government fraud - especially cases like this which claim *in terrorem populi*. Otherwise, restitution is never made and wrongdoers go unpunished.

In considering the damages in this case, what price tag does one put on killing a child's spirit? The loss of G.M.'s

spirit is evident in the "Before" and "After" photos taken of him (see EXHIBIT A). If this court will not hear this case, then it is saying that a child's spirit is worth nothing. And if the voices of innocent children are not heard, and such acts are allowed to continue, then America is truly doomed.

## CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that her petition for a writ of certiorari be granted.

Respectfully submitted,

JOAN HEFFINGTON
7145 Blueberry Lane
Derby, Kansas 67037
(316) 788-0901

Joan E. Heffington, Petitioner *Pro Se*
And on Behalf of Minor Son, G.M.

April 27, 2007

**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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JOAN HEFFINGTON, individually
And on behalf of her Minor Son, G.M.,

Plaintiff-Appellant,

v.

No. 05-3372
(D.C. No. 05-CV-4028SAC)
(D. Kan.)

SEDGWICK COUNTY DISTRICT COURT, Wichita, Kansas; NOLA FOULSTON, Sedgwick County District Attorney; JULIA CRAFT-ROCHAT, Sedgwick County Court-Appointed Attorney,

Defendants-Appellees.

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ORDER AND JUDGMENT

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Before HOLMES, McKAY, AND BRORBY, Circuit Judges

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Plaintiff-Appellant Joan Heffington appeals the district court's order denying her Fed. R. Civ. P. 60(b) motion. We affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App.P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral Estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Heffington filed an amended pro se complaint, purportedly on behalf of herself and her minor son, "G.M.," against the Sedgwick County, Kansas, District Court and individual defendants Nola Foulston, the Sedgwick County District Attorney, and Julie Craft-Rochat, a private attorney who had been appointed as counsel for G.M. in two juvenile criminal cases. The complaint included a due process claim under 42 U.S.C. & 1983 and numerous state law claims relating to an alleged illegal conspiracy between the defendants with respect to allegedly false criminal charges filed against G.M. The district court granted with prejudice the defendants' motion to dismiss all claims and entered judgment of dismissal on June 17, 2005. Among other bases for dismissal, the district court held that plaintiff could not, proceeding pro se, bring claims on behalf of her minor son, and that her & 1983 due process claim failed to assert any violation of her own legal rights and interests.

Without indicating what court rule it was filed under, Heffington filed a Motion to Reconsider on July 5, 2005. In that motion, she did not challenge the substance of the district court's dismissal order. Instead, she argued the dismissal should be set aside because, on the same day that the district court entered its order dismissing the complaint, a magistrate judge entered a scheduling order, which she construed as requiring the parties to mediate. Heffington

argued that the scheduling/mediation order should take precedence over the dismissal order. The district court denied her motion to reconsider, reasoning that it was not filed under Fed. R. Civ. P. 60, because it stated no ground for relief set forth in that rule. Moreover, the district court held that the July 5 motion was untimely if filed under Fed. R. Civ. P. 59(e), which requires that a motion to alter or amend a judgment "shall be filed no later than 10 days after entry of the judgment." Because the district court entered judgment dismissing plaintiff's complaint on June 17, a motion under rule 59(e) had to be filed no later than July 1. *See* Fed. R. Civ. P. 6(a)(excluding intervening Saturdays, Sundays and legal holidays from the computation when the period of time prescribed or allowed is less than eleven days.) The district court concluded it had no authority to grant plaintiff an extension of time to file her Rule 59(e) motion. *See* Fed. R. Civ. P. 6(b) (precluding extensions of time for taking action under Rule 59(e). The district court also stated that, in any event, Heffington's motion was without merit.

Plaintiff then filed a Motion to Set Aside Order under Fed. R. Civ. P. 60(b), in which she argued that her July 5 motion was not untimely because, under Fed. R. Civ. P. 6(e), the deadline to file was extended by three days due to service by mail of the dismissal order. On the merits, she asserted that the district court abused its discretion by denying her July 5 motion, and she asked the district court to reconsider the magistrate's scheduling order and its dismissal order, because the law requires litigants in civil cases to consider mediation. The district court denied this Rule 60(b) motion on August 31, noting that none of the grounds asserted fell within the six grounds for relief specified in that rule. The district court further ordered that Heffington was precluded from filing, without leave of court, any new motion in this case based on the same allegations or grounds that had been

decided in the court's prior orders. On September 26, 2005, Heffington filed a notice appealing "the final judgment of the district court...entered in this case on August 31, 2005." R., Doc 36 at 1.

## Scope of Appeal

"The filing of a timely notice of appeal is an absolute prerequisite to our jurisdiction." *Parker v. Bd. of Pub. Util.*, 77 F.3d at 1289, 1290 (10th Cir. 1996). July 18, 2005, was the deadline for Heffington to file a notice of appealing the district court's judgment of dismissal entered on June 17. See Fed. R. App. P. 4(a)(1)(A). A timely motion filed under Fed. R. App. 4(a)(4)(A) could extend the deadline for a notice of appeal, but plaintiff did not file such a motion. Whether her July 5 motion was filed under Fed. R. Civ. P. 60 or Fed. R. Civ. P. 59(e), it was not filed within ten days of entry of the entry of judgment and therefore did not extend her time to appeal.

Heffington asserts that, under Fed. R. Civ. P. 6(e), the deadline to file her July 5 motion was extended by three days, because the district court served her by mail with the judgment of dismissal. But that three-day extension applies only "[w]henever a party must or may act within a prescribed period after service" made in a specified manner. Fed. R. Civ. P. 6(e). In *Parker*, 77 F.3d at 1291, we held that the three-day mail provision of Rule 6(e) does not extend the ten-day deadline for filing a Rule 59(e) motion, because the deadline for filing such a motion is triggered by entry of judgment and not service of notice. The same reasoning applies to a Rule 60 motion, which under Fed. R. App. P. 4(a)(4)(A)(vi) must be filed within ten days of entry of judgment in order to extend the time period for filing a notice of appeal. Therefore, because Heffington failed to file a notice of appeal within thirty days of entry of judgment, and no intervening motion extended that deadline, this court

does not have jurisdiction to hear her appeal of the district court's judgment of dismissal.[1]

Plaintiff also did not file a timely notice of appeal of the district court's denial of her July 5 motion, which was entered on August 4, 2005. Construing her September 26, 2005, pro se notice of appeal liberally, we conclude, however, that this court does have jurisdiction to consider her appeal of the district court's denial of her Rule 60(b) motion, which was entered on August 31, 2005. See Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 n.3 (10th Cir. 1993) (liberally construing pro se notice of appeal as to which order was appealed from).

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[1] We note, however, that the district court's review of defendants' motion to dismiss was both thorough and generous to the plaintiff's interests, and that the district court's dismissal of the complaint under *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) ("[A] minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney."), and *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."), appears to have been correct.

**Review of Denial of Rule 60(b) Motion**

"A district court's decision to grant or deny a Rule 60(b) motion is reviewed for an abuse of discretion." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1230 (10th Cir. 1999). Relief under Rule 60(b) "is extraordinary and may only be granted in exceptional circumstances." *Id.* At 1231 (quotation omitted.) The district court held that Heffington's motion did not raise any ground listed in Rule 60(b). In her reply of

defendant's opposition, she did argue that her motion sought relief under Fed. R. Civ. P. 60(b)(1) and Fed. R. Civ P. 60(b)(3). She accused the district court of "inexcusable neglect," R., Doc. 34 at 1, based on its alleged delay in mailing the judgment of dismissal to her, and she argued further that as a result of that lack of proper notice, "defendants were in violation of Rule 60 due to 'mistake, inadvertence, surprise, or excusable neglect." *Id.*, at 2. Plaintiff also claimed that two different decisions entered the same day by two different judges implies 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.'" *Id.*

We agree with the district court that Heffington's motion raised no proper ground for relief under Rule 60(b). Further, the underlying issue raised by plaintiff – that the district court's dismissal of the complaint for failure to a state a claim upon which relief could be granted should be set aside in favor of a magistrate judge's scheduling order – is without merit. We hold that the district court did not abuse its discretion in denying plaintiff's Rule 60(b) motion.

The judgment of the district court is AFFIRMED. The motion to proceed in forma pauperis is DENIED. We remind Heffington of her responsibility to pay the appellate filing fee in full.

Entered for the Court

Monroe G. McKay
Circuit Judge

Dated January 29, 2007

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JOAN HEFFINGTON,
On behalf of Minor Son, G.M.,

Plaintiffs,

Vs. No. 05-4028-SAC

DISTRICT COURT OF SEDGWICK COUNTY, WICHITA, KANSAS, NOLA FOULSTON, and JULIA CRAFT-ROCHAT,

Defendants.

Memorandum and Order

This case comes before the court on pro se plaintiff's motion to set aside order, pursuant to Fed. R. Civ. P. 60(b). Plaintiff contends that the court's order filed August 2, 2005, which denied her Rule 59(e) motion for reconsideration of the court's dismissal of her case, is erroneous.

Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances. Servants of *Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir.2000). "A litigant shows exceptional circumstances by satisfying one or More of Rule 60(b)'s six grounds." *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir.1991), cert. denied,

506 U.S. 828 (1992). A movant cannot use Rule 60(b) to reargue the merits of the underlying judgment, nor can the rule be used as a substitute for appeal. *United States v. 31.63 Acres of Land*, 840 F.2d 760, 761 (10th Cir.1988).

The grounds asserted by plaintiff are not alleged to fall, and do not fall, within Rule 60's six grounds, and plaintiff otherwise fails to show exceptional circumstances. Instead, plaintiff merely rehashes contentions previously rejected by the court.

Plaintiff first claims that the court erred in finding her Rule 59 motion untimely because her deadline for her Rule 59(e) motion should have been extended three days pursuant to Fed. R. Civ. P. 6(e). This assertion is incorrect, as no three day extension is either required or permitted. See *Parker v. Board of Public Utilities*, 77 F.3d 1289, 1290 (10th Cir. 1996). Plaintiff additionally contends that the court's order dismissing the case erred in other respects. The court has previously addressed those assertions, and still finds no merit in them.

Plaintiff has now exhausted her avenues for challenging this court's order, absent an appeal. The court's decision dismissing plaintiff's case is final and shall not be reconsidered. Because of the pattern evidenced in plaintiff's recent and meritless filings, which impose a burden on the judiciary as well as on plaintiff's opponents, the court orders that plaintiff is precluded from filing, without leave of this court, any new motions in this case based on the same allegations or grounds that have been decided in the court's prior orders. Accordingly, before the plaintiff may file any such motion, she must ask for leave of the court by filing a "Motion for Court Order Seeking Leave to File" and attaching thereto: 1) a copy of her proposed motion or request; and 2) a declaration under penalty of perjury prepared pursuant to 28 U.S.C. & 1746 or a sworn affidavit certifying that her motion does not involve allegations or grounds that have been decided or litigated in this case, and

that her new allegations and grounds are not frivolous or made in bad faith.

IT IS THEREFORE ORDERED that plaintiff's motion to set aside order (Dk. 32) is denied.

IT IS FURTHER ORDERED that plaintiff shall file no more motions in this case except in accordance with the above stated conditions.

Dated this 31st day of August, 2005, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JOAN HEFFINGTON,
On behalf of Minor Son, G.M.,

Plaintiffs,

Vs. No. 05-4028-SAC

DISTRICT COURT OF SEDGWICK COUNTY, WICHITA, KANSAS, NOLA FOULSTON, and JULIA CRAFT-ROCHAT,

Defendants.

Memorandum and Order

This case comes before the court on pro se plaintiff's motion to reconsider the court's order dated June 17, 2005, which granted defendants' motion to dismiss the case. In her motion, plaintiff alleges that the United States Magistrate Judge entered an order relating to mediation approximately two hours before this court ordered dismissal of this case, and contends that such order "should have precedence in this matter." Dk. 28, p. 1.

Plaintiff's motion to reconsider is subject to D.Kan Rule 7.3(a). The decision whether to grant or deny a motion to reconsider is committed to the court's sound discretion. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

The court first examines whether plaintiff's motion is timely. Under Rule 7.3(a), a motion seeking reconsideration of a dispositive order must be filed within ten days of the court's order, *see* Fed. R. Civ. P. 59(e), unless the grounds fall within those set forth in Fed. R. Civ. P. 60. Plaintiff's motion for reconsideration states no grounds set forth in Rule 60, and is thus bound by the ten-day period of Fed. R. Civ. P. 59(e). Because judgment on the court's order dismissing the case was entered on June 17, plaintiff had until July 1, 2005, to file her motion for reconsideration. This motion filed July 5th is thus untimely.

This court is not empowered to grant plaintiff additional time to file her 59(c) motion. Rule 59(e) specifies that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Rule 6(b), which grants the district court limited authority to extend various time limits under the rules, provides that the court "may not extend the time for taking any action under Rule[ ]...59(b),(d) and (e),... except to the extent and under the conditions stated [therein]." *Id.; see also Collard v. United States*, 10 F.3d 718, 719 (10th Cir.1993)(Rule 6(b) expressly prohibits a trial court from extending the time to file a Rule 59(e) motion). Rule 59 provides no exception to the ten-day rule. Thus, this court lacks authority to grant plaintiff additional time in which to file a Rule 59(e) motion.

Even assuming the motion to reconsider had been timely filed, the court would deny it as inappropriate. The magistrate's order which plaintiff alludes to was the initial order regarding planning and scheduling in the case, and was not an order requiring mediation or preempting this court's order dismissing the case.

Dated this 4th day of August, 2005, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JOAN HEFFINGTON,
On behalf of Minor Son, G.M.,

Plaintiffs,

Vs. No. 05-4028-SAC

DISTRICT COURT OF SEDGWICK COUNTY, WICHITA, KANSAS, NOLA FOULSTON, and JULIA CRAFT-ROCHAT,

Defendants.

Memorandum and Order

This case comes before the court on defendant's motion to dismiss the case. Plaintiff Joan Heffington, acting pro se and purportedly on behalf of her minor son, G.M., claims that defendants planned to persecute her and her juvenile son by bringing unethical, unwarranted and false charges against him. The case is styled as & 1983 case, with apparent state claims for outrage, conspiracy and fraud against the District Court of Sedgwick County, Nola Foulston, the Sedgwick Co. District Attorney, and Julia Craft-Rochat, a private attorney. Plaintiff alleges that the various defendants' conduct in the state proceedings violated rights guaranteed by the

Fourteenth Amendment.

Specifically, plaintiff complains of three juvenile prosecutions against her son in which defendant Craft-Rochat, a private attorney, served as his court-appointed defense attorney, and Nola Foulston served as the prosecutor. The first is a 2002 prosecution for Filing a False Alarm. This charge arose from G.M.'s statement that someone intended to "shoot up" the Derby Middle School the next day. Plaintiff contends that her son's statement was true and accurate, and that defendants knew the charge against her son was false. The charge was ultimately dismissed, but plaintiff believes the charge was filed in retaliation for her filing of a lawsuit in 2001.

The second prosecution is a 2003 charge for criminal deprivation of property. G.M. was accused of stealing a truck, and pleaded "no contest." That conviction has not been reversed. Plaintiff contends that G.M. had merely borrowed a friend's truck for a ride, and that G.M. was coerced by defendant Craft-Rochat into agreeing to the plea. Others charged in the same offense were allegedly permitted to take diversion, but G.M. was sentenced to one year's probation.

The third is a 2004 charge for possessing/consuming alcohol by a minor. This charge, which is still pending, arose from a party G.M. attended at a home which was raided by police, who allegedly administered breathalyzer tests to 67 persons. G.M. is one of only eight persons charged, giving rise to plaintiff's claims of selective and discriminatory prosecution.

Defendants raise multiple arguments in support of dismissal, which are addressed below.

**Improper service of process**

Defendants first claim that service as to each defendant was improper, and move to dismiss pursuant to Fed. R. Civ.

P. 12(b)(2)(lack of personal jurisdiction), and (b)(5) (insufficiency of service of process). Plaintiff counters that she brought copies of her complaint to the court clerk in an attempt to serve defendants properly by mail, that she followed the instructions given her by a named court clerk, and that defendants had actual notice of the suit. No record is presented in support of either party's assertions.

Although plaintiff's service may or may not have been in strict compliance with the applicable service rules and statutes, it appears that defendants have received actual notice of the cause of action, and that plaintiff may have been affirmatively misled by the clerk of the court. See *Kitchens v. Bryant County Nat'l Bank*, 825 F.2d 248, 255-256 (10th Cir. 1987)(noting that "the federal courts generally take a permissive attitude toward the mechanisms employed for service of process when defendant actually receives notice")(quotation omitted). Because the facts are disputed and unsupported by citation to the record, the court declines to dismiss on this basis.

**Parent's representation of child**

Plaintiff, a pro se party, seeks to bring this case on behalf of her minor son. Although plaintiff has the right to appear in propria persona, she is not an attorney and is not represented by one, thus she does not have the right to represent her son. Under Fed. R. Civ. P. 17(c) and 28 U.S.C. & 1654, "a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney." *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). Thus plaintiff cannot bring suit on behalf of her son as next friend.

Further, "[t]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In this case, plaintiff

complains that she has suffered "emotional distress and mental anguish," including an anxiety attack, as well as physical problems including back and neck pain, headaches and eye ulcers, "due to the wrongful persecution" of her son. Dk. 8, p. 3, para. 16. But a careful reading of her amended complaint fails to reveal claims that plaintiff's own legal rights and interests have been violated. Instead, the alleged deprivation of due process rights, which is the sole claim giving rise to this court's jurisdiction, are solely those of her son. Specifically, plaintiff contends that "[d]iscrimination occurred in the form of selective prosecution when G.M. was charged with possession/consumption of alcohol by a minor while all of the football players were allowed to leave the party, and when G.M.'s friends were allowed to seek diversion in the truck incident but he was ordered to stand trial." Dk. 8, "Denial of Due Process," p. 12-13. Plaintiff further contends that "the conduct of the defendants in persecuting Mrs. Heffington's son G.M. through false, unwarranted and unethical charges" deprived him of due process. *Id.* But if anyone was deprived of due process through those events, it was solely G.M., and not his mother. Although dismissal is warranted on this basis, alone, the court also addresses below defendants' contention that plaintiff's amended complaint fails to state a claim upon which relief can be granted.

**Failure to state a claim - & 1983**

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The court accepts as true all well-pleaded facts, and reads all reasonable inferences in favor of the plaintiff. *See Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). A Rule 12(b)(6) motion to dismiss may be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her

theory of recovery. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court judges the sufficiency of the complaint accepting as true all well-pleaded facts, as distinguished from conclusory allegations. Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998). These deferential rules, however, do not allow the court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the...laws in way that have not been alleged." *Associated General Contractors v. California State Council of Carpenters*, 449 U.S. 519, 526 (1983)(footnote omitted).

The court liberally construes the allegations of a pro se complaint. See *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 806 (10th Cir. 1999). However, the court cannot "assume the role of advocate for the pro se litigant," "construct arguments or theories for the plaintiff in the absence of any discussion of those issues," or "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

**No color of state law – defendant Craft-Rochat**

Defendant Craft-Rochat served as G.M.'s court-appointed defense attorney for each of the three offenses at issue. Plaintiff asserts, and defendant denies, that such action was under color of state law, for purposes of 42 U.S.C. & 1983. Pursuant to that statute, a plaintiff must allege that the defendant deprived him of a right secured by the Constitution or laws of the United States while the defendant acted under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Furnace v. Oklahoma Corp. Comm'n*, 51 F.3d 932, 936 (10th Cir. 1995).

"Court appointed defense attorneys serve the interest of their client and do not act "under color of state law" within the meaning of 1983." *Kendrix v. Lietz*, 21 F.3d 1121, 1994

WL 123320,*1 (10th Cir. 1994). Such attorneys represent their client only, not the state, and cannot be sued in a 42 U.S.C. & 1983 action. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

If, however, plaintiff has alleged sufficient facts to establish a conspiracy between the private defense counsel and the prosecutor, the private party can be found to have acted under color of state law for purposes of Section 1983. See *Tower v. Glover*, 467 U.S. 914, 923 (1984). A court must proceed with caution when considering the pre-trial dismissal of conspiracy allegations in civil rights proceedings because of the difficult nature of the proof involved. *Fisher v. Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980). "Mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). "The standard is even stricter where the state officials involved in the conspiracy are immune from suit." *Id.* At 512. As the Tenth Circuit set out in *Norton v. Liddel*, 620 F.2d 1375, 1380 (10th Cir. 1980), the plaintiff must demonstrate "the existence of a significant nexus or entanglement between the absolutely immune state official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy."

The amended complaint fails to meet this standard. Instead, it is merely conclusory in its allegations, and does not demonstrate any nexus between defendant Craft-Rochat and any state actor. The amended complaint contains no facts establishing an agreement or meeting of the minds between anyone. *See Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230-31 (10th Cir. 1990)(dismissing conspiracy claim because plaintiff offered no evidence of communication between alleged co-conspirators and nothing that would even give rise to the inference that they conspired.) Accordingly, plaintiff has failed to demonstrate

that defendant Craft-Rochat has acted under color of state law.

**Conclusory conspiracy charges**

Defendant contends that plaintiff's claims of conspiracy are fatally conclusory, independently warranting dismissal of the & 1983 claims against all defendants. Conspiracy allegations, if conclusory in nature, are insufficient to state a claim for relief. See *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994) (dismissing & 1983 claim against public defenders on ground that the conspiracy allegations were conclusory and unsupported by facts).

> For a conspiracy claim, a plaintiff "must allege specific facts showing an agreement and concerted action among the defendants." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998); *see also Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004)(requiring plaintiff to allege by direct or circumstantial evidence that defendants had meeting of minds or agreement). "Conclusory allegations of conspiracy are insufficient to state a valid & 1983 claim." *Tonkovich*, 159 F.3d at 533(quotation omitted); *see also Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003)(holding conclusory conspiracy allegations are not sufficient to state a constitutional claim).

*Eden v. Voss*, 105 Fed. Appx. 234, 246, 2004 WL 1535829, *9 (10th Cir. 2004).

The amended complaint contains only broad allegations of conspiracy. Plaintiff contends that the named defendants "in agreeing with other state actors to participate in a plan to cause persecution of plaintiffs because of Ms. Heffington's previous litigation, her book, and the A.H.A! constitutes civil

conspiracy/collusion." Dk. 8, p. 9. Vague allusions to plaintiff's previous litigation are peppered throughout her amended complaint, but the nature of the prior lawsuit and its possible relevance to this proceeding are nowhere stated. Plaintiff's book is stated to be: *"Ten Secrets You Must Know Before Hiring a Lawyer."* Dk. 8, p. 4. Published in September of 2003, the book reportedly contains allegations of "outrageous government conduct," presumably among other unstated matters. *Id.* The acronym "A.H.A." refers to the "Association for Honest Attorneys," a non-profit organization "dedicated to discouraging litigation, improving the legal system, and seeking justice for all," of which plaintiff is the C.E.O. and founder. Dk. 8, p. 2.

Read liberally, the amended complaint states only conclusory allegations of conspiracy, which are insufficient to state a claim for relief under 42 U.S.C. & 1983. No specific facts tending to show an agreement and concerted action among the defendants, or between the defendants and others are included in the amended complaint.

**Prosecutorial immunity – defendant Foulston**

In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), the Supreme Court held that a prosecutor is absolutely immune from a section 1983 suit for damages based on his "initiating a prosecution and... presenting the State's case." This is true even if the prosecutor's decision to prosecute is malicious and without probable cause. *Id.* The scope of absolute immunity from suit under section 1983 extends to those prosecutorial activities "intimately associated with the judicial... process," such as initiating and pursuing criminal prosecutions. Defendant Foulston's acts in filing charges against the plaintiff's son were obviously part of the initiation of a prosecution, for which she is entitled to absolute immunity.

**Claims v. district court**

Section 1983 authorizes liability against "every person" who, acting under color of state law, violates another's federally protected rights. "Neither the state, nor a governmental entity that is an arm of the state for the Eleventh Amendment purposes, nor a state official who acts in his or her official capacity, is a "person" within the meaning of & 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989). Accordingly, the Tenth Circuit has held that a state court is not a "person" under & 1983. *See, e.g., Harris v. Champion*, 51 F.3d 901, 905-906 (10th Cir. 1995); *Coopersmith v. Supreme Ct. of Colo.*, 465 F.2d 993, 994 (10th Cir. 1972). Thus the claims against the District Court of Sedgwick County, as well as those against prosecutor Foulston in her official capacity, must be dismissed.

Further, plaintiff's claims against the District Court of Sedgwick County, Wichita, Kansas are clearly within the Eleventh Amendment's bar of actions for damages "against a state in federal court, even by its own citizens, unless the state waives that immunity." *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). *See Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998)(state or state agency sued in its own name is not subject to federal compensatory or injunctive relief). Because no waiver of immunity has been made, plaintiff's action against the district court itself is barred.

**Injunctive relief**

In addition to her claim to monetary damages, interest, and attorneys' fees, plaintiff seeks "injunctive relief enjoining all defendants from continuing the intentional infliction of emotional distress." Dk. 8, p. 17. Plaintiff lacks standing to bring an action for injunctive relief absent a

showing of a real or immediate threat of future harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Past exposure to illegal conduct does not in itself show a present case and controversy regarding injunctive relief. *Id.; see also, Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487, 493 (10th Cir. 1998); *Smith v. Colorado Dept. of Corrections*, 23 F.3d 339, 341 (10th Cir. 1994). In this case, plaintiffs' allegations do not establish a real and immediate threat of future harm, as is necessary to sue for injunctive relief.

The court finds it necessary to address the *Rooker-Feldman* doctrine and other alternative grounds for dismissal of plaintiff's & 1983 claim, although they may well be meritorious. Based upon the multiple reasons set forth above, it is obvious that the plaintiff cannot prevail on the facts alleged and it would be futile to give her an opportunity to amend. Accordingly, plaintiff's & 1983 claims shall be dismissed with prejudice.

**State law claims**

The amended complaint includes claims brought pursuant to state law. This court, as federal district court, lacks original jurisdiction of plaintiff's state law claims, including conspiracy, fraud, and outrage, and has subject matter jurisdiction, if at all, only by virtue of supplemental jurisdiction.

Pursuant to 28 U.S.C. & 1367(c)(3), "[a] district court may decline to exercise supplemental jurisdiction over a claim when it has dismissed all claims over which it had original jurisdiction." *Exum v. U.S. Olympic Committee*, 389 F.3d 1130, 1138-1139 (10th Cir. 2004). The exercise of supplemental jurisdiction in this situation is discretionary. *Id; see Gold v. Local 7 United Food and Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998), overruled on other grounds, *Styskal v. Weld County*

*Comm'rs.*, 365 F.3d 855 (10th Cir. 2004). Section 1367 "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity." *Gold,* 159 F.3d at 1310. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness and comity-will point toward declining to exercise jurisdiction over the remaining state law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7(1988); see *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002)("[A] district court should normally dismiss supplemental state law claims after all federal claims have been dismissed, particularly when the federal claims are dismissed before trial.").

This case is in its genesis, and the parties have not spent a substantial amount of time litigating the state law claims. Having dismissed the sole claim over which this court had original jurisdiction, the court finds that the factors of judicial economy, convenience, fairness and comity do not warrant the exercise of supplemental jurisdiction over plaintiff's state law claims. Such claims shall be dismissed without prejudice.

IT IS THEREFORE ORDERED that defendant's motion to dismiss (Dk. 9) is granted.

Dated this 17th day of June, 2005, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

**EXHIBIT E**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| JOAN HEFFINGTON, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 05-4028-SAC |
| | ) | |
| SEDGWICK COUNTY DISTRICT COURT, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**INITIAL ORDER REGARDING PLANNING AND SCHEDULING**

Pursuant to Fed. R. Civ. P. 16(b), the court hereby sets this case for a scheduling conference by telephone on **July 25, 2005, at 10:30 a.m.** This court will initiate the telephone conference call. All *pro se* parties and attorneys who have entered an appearance in accordance with D. Kan. Rule 5.1(d) shall be available for the telephone conference call at the telephone numbers listed in the pleadings. If no telephone number is listed, the party shall provide the court with a telephone number to be reached at on the parties' planning meeting report.

Pursuant to Fed. R. Civ. P. 26(f), no later than **July 5, 2005**, the parties, in person and/or through counsel, shall confer to discuss the nature and basis of their claims and

defenses, to discuss the use of mediation or other methods of alternative dispute resolution (ADR), to develop a proposed discovery plan, and to make or arrange for the disclosures required by Fed. R. Civ. P. 26(a)(1).

In developing their case management plan, the parties should keep in mind that electronic information falls within the definition of "documents" or "data compilations" in Fed. R. Civ. P. 26(a)(1)(B) and Fed. R. Civ. P. 34(a). Prior to the Rule 26(f) planning conference, the parties should carefully investigate their clients' information management systems to determine whether discoverable information exists in electronic form. If such information exists, the parties should review the Electronic Discovery Guidelines on the court's website *(http://www.ksd.uscourts.gov/attorney/electronicdiscoveryguidelines.pdf)*.

Prior to the Rule 26(f) planning conference, the parties shall have conferred to discuss these issues and the benefits of mediation or other methods of ADR. Absent exceptional circumstances, the court expects the parties to utilize some form of ADR within ninety days of the scheduling conference. The parties and counsel should select the particular ADR process to be pursued and the person who will conduct the process, i.e., a mediator or other neutral.

By **July 15, 2005**, defendant(s) shall submit a completed report of the parties' planning conference to the undersigned magistrate judge. The report shall follow the report form that is posted on the court's website *(http://www.ksd.uscourts.gov/features/forms)*. It shall be submitted electronically in .pdf format as an attachment to an Internet e-mail sent to *ksd_ohara_chambers@ksduscourts.gov*, and **shall not be filed with the Clerk's Office**.

In addition to matters covered in Fed. R. Civ. P. 16(b) and (c), the parties shall be prepared to discuss the following matters at the scheduling conference:

1. The items listed in the report of parties' planning

conference.

2. The extent to which the parties intend to serve disclosures and discovery electronically, as permitted by D. Kan. Rules 5.4.2 and 26.3.
3. Whether a limited amount of discovery would enable the parties to present substantive issues for the court's resolution that would narrow the scope of the remaining discovery.
4. Whether potential dispositive motions could be presented for the court's determination at the earliest appropriate opportunity.
5. Whether documents should be exchanged without formal discovery requests in order to facilitate settlement, to avoid unnecessary expense, etc.
6. Whether any issues should be bifurcated.
7. All potentially dispositive issues.
8. The setting of definite dates for the final pretrial conference and trial.
9. Consent to trial before a U.S. Magistrate Judge, either at this time or as a backup if the assigned U.S. District Judge determines that his or her schedule is unable to accommodate the scheduled trial date. The parties should note that magistrate judges may preside over jury trials. Withholding consent will have no adverse substantive consequences but may delay the trial of the case.

Except when particularly complicated or simple, cases are usually set on a calendar for trial within twelve to fourteen months from the date of filing. Pursuant to D.Kan Rule 26.1, discovery in civil cases (other than patent infringement and antitrust cases) should be completed within four months of the filing of the scheduling order, unless the court, for good cause shown, establishes a longer or shorter period for the completion of discovery. The dispositive motion deadline is usually set four to six months before the

trial date to allow the court time to consider any such motions before the parties begin their final trial preparation. The final pretrial conference will usually be scheduled approximately two weeks after the close of discovery and approximately two weeks before the dispositive motion deadline.

The court appreciates the cooperation and diligent efforts which will secure a just and speedy determination of the issues in this case. If you have questions, please e-mail Kathy Grant, at *ksd_ohara_chambers@ksd.uscourts.gov*.

IT IS SO ORDERED.

Dated this 17th day of June, 2005, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge

## APPENDIX F

## MISCELLANEOUS DOCUMENTS

G.M. Photos.....EXHIBIT A

EXHIBIT A

G. M. before…

G. M. after…